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BEFORE THE ARIZONA CORPORATION

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Arizona Corporation Commission

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MAY 24 2013

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COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER COMPANY,
LLC FOR APPROVAL OF FINANCING TO
INSTALL A WATER LINE FROM THE WELL ON
TIEMAN TO WELL NO. 1 ON TOWERS.

DOCKET NO. W-04254A-12-0204

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER COMPANY,
LLC FOR APPROVAL OF FINANCING TO
PURCHASE THE WELL NO. 4 SITE AND THE
COMPANY VEHICLE.

DOCKET NO. W-04254A-12-0205

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER COMPANY,
LLC FOR APPROVAL OF FINANCING FOR AN
8,000-GALLON HYDRO-PNEUMATIC TANK.

DOCKET NO. W-04254A-12-0206

IN THE MATTER OF THE RATE APPLICATION
OF MONTEZUMA RIMROCK WATER
COMPANY, LLC.

DOCKET NO. W-04254A-12-0207

JOHN E. DOUGHERTY,

COMPLAINANT,

V.

MONTEZUMA RIMROCK WATER
COMPANY, LLC,

DOCKET NO. W-04254A-11-0323

RESPONDENT.

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER
COMPANY, LLC FOR APPROVAL OF A
RATE INCREASE.

DOCKET NO. W-04254A-08-0361

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER
COMPANY, LLC FOR APPROVAL OF A
FINANCING APPLICATION.

DOCKET NO. W-04254A-08-0362

PROCEDURAL ORDER

BY THE COMMISSION:

This Procedural Order concerns three separate motions filed by Intervenor/Complainant John

Dougherty in this consolidated matter concerning Montezuma Rimrock Water Company, LLC ("Montezuma"). Each motion is discussed and resolved separately herein.

Motion for Partial Summary Judgment

On April 15, 2013, John Dougherty filed with the Commission a Motion for Partial Summary Judgment--Allegation XVII Amended Formal Complaint ("MPSJ"), along with a Statement of Facts in Support of Intervenor/Complainant's Motion for Partial Summary Judgment ("SOF"). In the MPSJ, Mr. Dougherty asserts that there is no genuine issue as to any material fact in Allegation XVII(A)-(C) of his Amended Complaint and that he is entitled to judgment as a matter of law. Mr. Dougherty further states that granting the relief requested in the MPSJ could dispose of his Formal Complaint in its entirety. In addition to requesting that the MPSJ be granted, Mr. Dougherty is requesting that Montezuma and its owner, Patricia Olsen, be found in contempt of the Commission in violation of A.R.S. § 40-424; that Montezuma and Ms. Olsen be found in violation of A.R.S. § 40-425 for docketing three fraudulent leases; that Montezuma and Ms. Olsen be found in violation of A.R.S. §§ 40-301 and 40-302 for entering into capital leases without Commission authorization; that the Commission make a criminal referral to the Arizona Attorney General or County Attorney, under A.R.S. § 40-421, for the fraud violations alleged in the MPSJ; that Montezuma's Certificate of Convenience and Necessity ("CC&N") be revoked; and that the Commission grant to Mr. Dougherty such other and further relief as the Commission deems just, equitable, or proper.

As set forth in Mr. Dougherty's Amended Formal Complaint filed on February 27, 2013, and corrected in Mr. Dougherty's filing made on February 28, 2013, Allegation XVII(A)-(C) states:

A. Montezuma knowingly and willfully violated the January 4, 2012, March 12, 2012 and April 9, 2012 Procedural Orders in Docket W-4254A-08-361, W-4254A-08-362 by failing to docket a March 22, 2012 Capital Lease agreement between Montezuma and Nile River Leasing, LLC for an Arsenic Treatment Building. Instead, the Company docketed a fraudulent March 16, 2012 lease agreement between Mrs. Patricia Olsen, personally, and Nile River Leasing for the building. This action was undertaken to circumvent Commission approval of Capital Leases in violation of ARS S40-301, ARS S40-302, ARS S40-424 and ARS S40-425.

B. Montezuma knowingly and willfully violated the January 4, 2012, March 12, 2012 and April 9, 2012 Procedural Orders in Docket W-4254A-08-361, W-4254A-08-362 by failing to docket a Capital Lease agreement with Financial Pacific Leasing, LLC for an Arsenic Treatment Facility signed on or about April 3, 2012. Instead, the Company docketed a fraudulent March 16, 2012 lease agreement between Mrs. Patricia Olsen,

1 personally, and Nile River Leasing, for the Arsenic treatment equipment.
2 This action was taken to circumvent Commission approval of Capital
3 Leases in violation of ARS S40-301, ARS S40-302, ARS S40-424 and
4 ARS S40-425.

5 C. Ms. Patricia Olsen knowingly and willfully docketed a fraudulent lease
6 agreement between Montezuma and Financial Pacific Leasing for an
7 Arsenic Treatment Facility dated on or about May 2, 2012 in an October
8 25, 2012 filing docketed in W-04254A-12-0204 et seq. when, in fact, the
9 Company had entered into an effective lease agreement with Financial
10 Pacific Leasing on or about April 3, 2012. This action was taken to
11 circumvent Commission approval of Capital leases in violation of ARS
12 S40-301, ARS S40-302, ARS S40-424 and ARS S40-425.

13 Mr. Dougherty asserts that the MPSJ should be granted because there is no genuine issue as to any
14 material fact for the above allegations, and the legal and factual bases for granting the MPSJ are
15 straightforward. Mr. Dougherty supports the MPSJ with the SOF, which includes eight exhibits,
16 constituting various versions of lease agreements, affidavits from two individuals with Nile River,
17 and two letters from the legal department of Financial Pacific.

18 On May 15, 2013, Montezuma filed a Response to Motion for Partial Summary Judgment and
19 a Response to Statement of Facts. In the Response to MPSJ, *inter alia*, Montezuma asserts that Mr.
20 Dougherty has not established any basis for issuing summary judgment, in that Montezuma disputes
21 Mr. Dougherty's allegations relating to Montezuma's motives and fraudulent scheme, and disputed
22 issues of fact preclude summary judgment. Montezuma also makes various assertions related to the
23 merit of Mr. Dougherty's requests for relief. In the Response to SOF, Montezuma asserts, *inter alia*,
24 that Financial Pacific provided Montezuma with both an April 2012 and a May 2012 lease
25 agreement; that Montezuma did not have a copy of Rider 2 to the Nile River lease agreement in its
26 files; that Montezuma does not know who signed the March 16, 2012, lease agreement for Nile
27 River; and that Montezuma believed that the signature for the March 16, 2012, Nile River lease
28 agreement was an authorized signature.

Staff has not filed a response to the MPSJ.

Summary judgment can only be granted if the entire record in a case establishes that there is
no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
of law.¹ In considering a request for summary judgment, a tribunal is required to believe the non-

¹ See Ariz. R. Civ. P. 56(c)(1); *Chanay v. Chittenden*, 115 Ariz. 32, 37 (1977).

1 movant's evidence and to draw all justifiable inferences in the non-movant's favor.² This is a high
2 standard, and one that Mr. Dougherty has not met. There are genuine issues of material fact as to the
3 assertions in Allegation XVII(A)-(C), particularly as the Commission must, for purposes of
4 considering the MPSJ, believe Montezuma's assertions and draw all justifiable inferences in
5 Montezuma's favor. For example, if the Commission must believe Montezuma's assertion that it
6 does not know who signed the March 16, 2012, lease agreement for Nile River and believed that the
7 signature was legitimate, the Commission cannot find that Montezuma knowingly and willfully
8 docketed a fraudulent lease agreement to circumvent Commission approval. Montezuma's assertions
9 of ignorance and innocence as to the March 16, 2012, lease agreements would negate the state of
10 mind necessary to prove Mr. Dougherty's allegation. Because this one example, standing alone,
11 necessitates denial of Mr. Dougherty's MPSJ, no further analysis is needed.

12 Motion to Bar Rate Application

13 On April 15, 2013, Mr. Dougherty also filed a Motion to Bar Rate Application ("MTB"). In
14 the MTB, Mr. Dougherty requests that the Commission "bar [Montezuma's] Financing Application
15 seeking retroactive approval of Capital leases with Nile River Leasing and Financial Pacific
16 Leasing." Mr. Dougherty's argument in the MTB is that the Commission lacks the authority, under
17 A.R.S. §§ 40-301 and 40-302, to grant retroactive approval of a capital lease because the statutes
18 require approval to be obtained before a company signs, accepts equipment under, and begins making
19 payments on a lease. Mr. Dougherty also states that Montezuma has failed to provide a legal basis
20 for obtaining retroactive Commission approval for the capital leases.

21 On May 3, 2013, Montezuma filed a Response to Motion to Bar Rate Application, asserting
22 that the MTB should be denied because A.R.S. §§ 40-301 and 40-302 do not preclude the
23 Commission from retroactively approving financial transactions, and the Commission has
24 retroactively approved financial transactions for many years. Montezuma states that under the
25 Arizona Constitution, the Commission has plenary ratemaking authority, and Mr. Dougherty has not
26 cited any case law or authority to the contrary. Montezuma asserts that the Arizona Legislature
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28 ² *Orme School v. Reeves*, 166 Ariz. 301, 309-10 (1990).

1 cannot, by statute, override the Commission's constitutional ratemaking authority, which includes the
2 authority to retroactively review and approve financing and debt transactions. Montezuma also
3 asserts that the MTB should be denied because Mr. Dougherty has previously filed a motion in this
4 consolidated matter requesting that the Commission require submission of the leases for approval as
5 capital leases under A.R.S. § 40-302. Montezuma asserts that Mr. Dougherty may not permissibly
6 change his mind and now oppose Montezuma's submission of the leases for approval.

7 Staff has not filed a response to the MTB.

8 Mr. Dougherty's MTB could be viewed as a request for the Commission not to consider the
9 financing applications in this consolidated matter for any purposes, particularly because Mr.
10 Dougherty has requested to "bar the Company's Financing Application." However, such a broad
11 interpretation would be inconsistent with Mr. Dougherty's apparent desire to litigate the nature of the
12 various filed leases, the validity of the various filed leases, and whether Montezuma and/or Ms. Olsen
13 has engaged in conduct violating A.R.S. §§ 40-301, 40-302, and 40-303.³ Thus, rather than
14 interpreting the MTB as a request to bar the Commission's consideration of the financing
15 applications, and of the underlying financing documents, the Commission instead considers the MTB
16 to be, essentially, a legal brief arguing against retroactive Commission approval of the financing
17 agreements. As such, the MTB is premature. Mr. Dougherty and the other parties will be provided
18 the opportunity to put forth legal arguments, in the form of oral argument and/or written briefs
19 regarding the interpretation of the applicable statutes and the Commission's authority thereunder, at
20 the conclusion of the evidentiary portion of this matter. Thus, it is neither necessary nor appropriate
21 to rule upon such interpretation and authority at this time, and no such ruling will be made.

22 Motion for Revised Public Notice of a Rate Hearing

23 On April 29, 2013, Mr. Dougherty filed a Notice of Montezuma's Violation of Procedural
24 Orders; Motion for Revised Public Notice of a Rate Hearing ("MRPN"). In the MRPN, Mr.
25 Dougherty asserts that Montezuma has failed to comply with several Procedural Orders because
26 Montezuma's April 24, 2013, Notice of Filing included copies of promissory notes rather than a copy

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28 ³ It should be noted that violation of A.R.S. § 40-303(B) subjects a public service corporation to monetary penalties and that violation of A.R.S. § 40-303(C) is a class 4 felony.

1 of its public notice billing insert as stated in the Notice of Filing. Mr. Dougherty also asserted that
2 the public notice prescribed in the Procedural Orders has become defective in any event because it
3 does not specifically reference Montezuma's April 12, 2013, Notice of Filing Financing Applications
4 and the potential impacts of those financings on Montezuma's proposed rates. Mr. Dougherty
5 requests that the Commission issue and require mailing and newspaper publication of a revised notice
6 of rate hearing including the true and complete Nile River and Financial Pacific leases, the purpose
7 and lender for a \$38,000 promissory note, inclusion of a \$108,000 Arizona Water Infrastructure
8 Finance Authority ("WIFA") loan and its impact on rates, and deletion of the \$6.04 monthly storage
9 tank surcharge. Additionally, Mr. Dougherty asserts that it may be necessary to reschedule the June
10 20, 2013, hearing date if Montezuma cannot provide such revised notice in a timely and truthful
11 manner.

12 Neither Montezuma nor Staff has filed a response to the MRPN.

13 A review of the April 24, 2013, filing by Montezuma reveals that Exhibit B, contrary to Mr.
14 Dougherty's assertions, is comprised of a certificate of public notice by Ms. Olsen attesting to having
15 mailed attached notices to Montezuma's customers along with their billing statements on April 12,
16 2013, and three separate attached public notice forms completed with information concerning
17 Montezuma's having filed applications for orders authorizing issuance of an \$8,000 promissory note,
18 a \$38,000 promissory note, and a \$108,000 promissory note. The public notice forms are taken from
19 the Commission's standard financing application, and the mailing of those public notice forms to
20 customers as billing inserts satisfies the Commission's notice requirements for financing applications.
21 Additionally, counsel for Montezuma states that revised notice, with the June 20, 2013, hearing date,
22 was sent to customers as a billing insert on April 10, 2013, and Exhibit A to the filing shows that
23 revised notice of the hearing, with the June 20, 2013, hearing date, and in substantial conformity to
24 the format required by Procedural Order, was published in the *Camp Verde Journal* on April 10,
25 2013. The June 20, 2013, hearing date was also expressly mentioned in the public comment
26 proceeding on May 3, 2013. In light of the notice already provided by Montezuma, Mr. Dougherty's
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MRPN is without merit and will be denied.⁴

IT IS THEREFORE ORDERED that Mr. Dougherty's **Motion for Partial Summary Judgment** is hereby **denied**.

IT IS FURTHER ORDERED that Mr. Dougherty's **Motion for Revised Public Notice** of a Rate Hearing is hereby **denied**.

IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 24th day of May, 2013.


SARAH N. HARPRING
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered/e-mailed this 24th day of May, 2013, to:


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⁴ Although Mr. Dougherty's MRPN was deemed denied on May 20, 2013, in any event, by operation of prior Procedural Order, the MRPN is dealt with substantively herein for the sake of clarity.